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Babcock/Lechmere Revisited: Derivative Nature of Union Organizers' Right of Access to Employers' Property Should Impact Judicial Evaluation of Alternatives

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BABCOCK/LECHMERE REVISITED: DERIVATIVE NATURE OF UNION ORGANIZERS' RIGHT OF ACCESS TO EMPLOYERS' PROPERTY SHOULD IMPACT JUDICIAL EVALUATION OF ALTERNATIVES

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JUDGE Bruce M. Selya of the First Circuit of the United States Court of Appeals called it a "murky corner of the law."¹ The less-than-crystal-clear area referred to by Judge Selya relates to the right of union representatives to go onto employer property (typically employee or employee-customer parking lots) to attempt to organize employees. In this regard, the 1992 United States Supreme Court decision in *Lechmere, Inc. v. NLRB*² has prompted pointed expressions of praise and criticism.³

I. LEGISLATIVE AND JUDICIAL BACKGROUND

The legislative and judicial background of the *Lechmere* decision may well be set out in quotations from several earlier Supreme Court decisions that addressed the issue directly or indirectly:

The enactment of the NLRA in 1935 marked a fundamental change in the Nation's labor policies. Congress expressly recognized that collective organization of segments of the labor force into bargaining units capable of exercising economic power comparable to that possessed by employers may produce benefits for the entire economy in the form of higher wages, job security, and improved working conditions. Congress decided that in the long run those benefits would outweigh the occasional costs of industrial strife associated with the organization of unions and the negotiation and enforcement of collective-bargaining agreements. The earlier notion that union activity was a species of "conspiracy" and that strikes and picketing were examples of unreasonable restraints of trade was replaced by an unequivocal national declaration of policy establishing the legitimacy of labor unionization and encouraging the practice of collective bargaining.⁴

Section 7 of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. § 157, guarantees to employees the right "to self-organization, to form, join, or assist labor organizations." This guarantee includes both the right of union officials to discuss organization with employees, and the right of employees to discuss organization among themselves. . . . Section 8 (a)(1) of the Act, as amended, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7. But organization rights are not viable in a vacuum; their effectiveness depends in some measure on

1. *Lechmere, Inc. v. NLRB*, 914 F.2d 313, 319 (1st Cir. 1990), *rev'd*, 502 U.S. —, 112 S. Ct. 841 (1992).

2. *Lechmere*, 502 U.S. —, 112 S. Ct. 841 (1992).

3. For scholarly articles praising and condemning, respectively, the *Lechmere* decision, see generally Michael L. Stevens, *The Conflict Between Union Access and Private Property Rights: Lechmere, Inc. v. NLRB and the Question of Accommodation*, 41 EMORY L.J. 1317 (1992); Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere, Inc. v. NLRB*, 9 HOFSTRA LAB. L.J. 1 (1991).

4. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 190 (1978) [hereinafter *Sears*], *cert. denied*, 447 U.S. 935 (1980).

the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights. . . .

In seeking to provide information essential to the free exercise of organization rights, union organizers have often engaged in conduct inconsistent with traditional notions of private property rights. The Board and the courts have the duty to resolve conflicts between organization rights and property rights, and to seek a proper accommodation between the two. This Court addressed the conflict which often arises between organization rights and property rights in *NLRB v. Babcock & Wilcox Co.*⁵

First, the right to organize is at the very core of the purpose for which the NLRA was enacted. . . . Second, *Babcock* makes clear that the interests being protected by according limited-access rights to nonemployee, union organizers are not those of the organizers but of the employees located on the employer's property. The Court indicated that "no . . . obligation is owed nonemployee organizers"; any right they may have to solicit on an employer's property is a derivative of the right of that employer's employees to exercise their organization rights effectively.⁶

[A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. . . . This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.⁷

The *Babcock & Wilcox* opinion established the basic objective under the Act: accommodation of Section 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other." The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective Section 7 rights and private

5. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972) [hereinafter *Central Hardware*].

6. *Sears*, 436 U.S. at 206 n.42.

7. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) [hereinafter *Babcock*].

property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance.⁸

II. NLRB APPROACH PRIOR TO *LECHMERE*

Prior to *Lechmere*, for resolving conflicts concerning whether an employer must allow union organizers on its property to contact employees, the National Labor Relations Board had developed a formula for resolving the conflict between Section 7 rights under the NLRA and the property rights of the employer in its 1988 *Jean Country* decision.⁹ In an oversimplified summary, the formula involved gathering facts on the strength of the employees' Section 7 rights, the strength of the employer's property rights, and the effectiveness and availability of alternative means of communication. In balancing these considerations, a decision then would be made under *Jean Country* concerning whether the employer would be required to afford access to its property to the union organizers.¹⁰ This approach by the NLRB was approved in the *Lechmere* case by the First Circuit Court of Appeals.¹¹

III. SUPREME COURT REVERSAL OF *JEAN COUNTRY* APPROACH

The Supreme Court reversed the Court of Appeals' *Lechmere* decision, finding it inconsistent with the seminal *NLRB v. Babcock & Wilcox* holding. The Court found it was not appropriate to approach each case by balancing Section 7 rights against property rights and that such an inquiry was pertinent only when union organizers do not have reasonable access to employees outside an employer's property.¹² The Court found that the *Babcock* exception "was crafted precisely to protect the Section 7 rights of those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society."¹³ The Court then stated that the union's burden of establishing the requisite isolation is a heavy one and "one not satisfied by mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication."¹⁴ "Because the employees do not reside on

8. *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976) [hereinafter *Hudgens*].

9. *Jean Country* and Local 305, Retail and Wholesale Employees Union, 291 N.L.R.B. 11 (1988) [hereinafter *Jean Country*]; see Rosemary M. Collyer, *Union Access: Developments Since Jean Country*, 6 LAB. LAW. 839 (1990); Peter J. Ford, *The NLRB, Jean Country, and Access to Private Property: A Reasonable Alternative to Reasonable Alternative Means of Communication Under Fairmont Hotel*, 13 GEO. MASON U. L. REV. 683 (1991).

10. *Jean Country*, 291 N.L.R.B. at 16-19. For a critical analysis of the *Jean Country* approach, see Dianne Avery, *Federal Labor Rights and Access to Private Property: The NLRB and the Right to Exclude*, 11 INDUS. REL. L.J. 145 (1989).

11. *Lechmere*, 914 F.2d 313, 320-23 (1st Cir. 1990), *rev'd*, 502 U.S. —, 112 S. Ct. 841 (1992); *Employees' Right To Organize*, 104 HARV. L. REV. 1407 (1991).

12. *Lechmere*, 502 U.S. —, 112 S. Ct. at 848.

13. *Id.* at 849.

14. *Id.*

Lechmere's property," the Court states, "they are presumptively not 'beyond the reach' of the union's message."¹⁵ In reviewing the methods of communication available to the union, the Court concluded, "[t]hus, signs (displayed, for example, from the public grassy strip adjoining Lechmere's parking lot) would have informed the employees about the union's organizational efforts."¹⁶ The majority found that no "unique obstacles" existed to the union's reaching the employees.¹⁷

IV. DISSENT BY JUSTICES WHITE, BLACKMUN AND STEVENS

Justice White, joined by Justices Blackmun and Stevens, dissented from the majority ruling in *Lechmere*. Justice White emphasized the *Babcock* teaching that "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others."¹⁸ Further, he stressed that *Babcock* requires a correct accommodation between property rights and organizational rights. Justice White criticized the majority's fashioning a general rule from the *Babcock* reference to cases in which the living quarters of the employees place them beyond the reach of the union.¹⁹ He further emphasized that actual communication with nonemployee organizers is contemplated in *Babcock*, not a mere notice that an organization campaign is under way.²⁰ In calling the *Babcock* teaching a neutral and flexible rule of accommodation, Justice White noted that the Court's later *Hudgens* decision called for a "locus of accommodation" that will vary with the strengths of the respective Section 7 rights and private property rights.²¹ Lastly, Justice White condemned the majority for its failure to defer to an administrative agency in administering a statute in a situation in which Congress had left open the question of how Section 7 rights and property rights were to be accommodated under the NLRA.²²

V. PURPOSE OF ARTICLE

The purpose of these comments is not to merely reanalyze and/or criticize the *Lechmere* holding. Rather its design is to focus fresh attention on the basic Section 7 rights that lie at the foundation of the *Babcock* decision. By better understanding the nature of these judicially recognized underlying rights bestowed by Congress, judicial results consistent with the purposes of the NLRA may be more perfectly understood and realized.

15. *Id.*

16. *Id.* at 849-50.

17. *Lechmere*, 502 U.S. —, 112 S. Ct. at 850.

18. *Id.* (White, J., dissenting) (quoting *Babcock*, 351 U.S. at 113).

19. *Id.* (White, J., dissenting).

20. *Id.* at 851 (White, J., dissenting).

21. *Id.* (White, J., dissenting).

22. *Lechmere*, 502 U.S. —, 112 S. Ct. at 852 (White, J., dissenting).

VI. *BABCOCK* DECISION FOUNDATIONAL

The *Babcock* decision is foundational for the current state of the law in regard to the rights of nonemployee union organizers to enter certain areas of an employer's property for the purpose of organizing or giving information to employees. It appears that prior to *Babcock*, the distinction was not clearly drawn between the rights of employees and nonemployees engaging in union organizational activity on the property of an employer, with both the nonemployee organizers and employees being subject to the restrictions currently applied to employee activity.²³ Currently, employees can engage in organizational activities while on duty, subject to regulations and rules that are reasonably designed to foster matters such as safety and efficiency in the workplace.²⁴

Babcock held that the distinction between employee and nonemployee organizational activity was one of "substance"²⁵ and set the guidelines of when nonemployee organizers must be permitted on employer property for organizational purposes. The *Babcock* decision limited itself to basic organizational activities.²⁶ The Supreme Court in its 1976 *Hudgens* decision made clear that the *Babcock* principle of protecting Section 7 rights extended to other activities protected under the NLRA, i.e. legal employee picketing in connection with a labor dispute arising out of collective bargaining between an employer and a union.²⁷ The *Hudgens* decision is important in that it ended a period after the Court's *Logan Valley*²⁸ decision when shopping malls and similar property were equated by the Supreme Court as the functional equivalent of public property and the nonemployee union organizers were held to be exercising constitutionally protected speech rights. The *Logan Valley* doctrine was expressly overruled by *Hudgens*,²⁹ which held that in the future the *Babcock* principle would be used to resolve such questions as nonemployee access to employer property, rather than constitutional standards.³⁰

The *Babcock* decision itself has not been without its detractors, especially concerning the employee-nonemployee distinction regarding orga-

23. See *NLRB v. Seamprufe, Inc.*, 222 F.2d 858, 861 (10th Cir. 1955); *Seamprufe, Inc.*, 109 N.L.R.B. 24, 32 (1954); *Carolina Mills, Inc.*, 92 N.L.R.B. 1141, 1166 (1951).

24. Dexter L. Hanley, *Union Organization on Company Property—A Discussion of Property Rights*, 47 GEO. L.J. 266, 272-76, 281 (1958). A seminal case establishing these rights was *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945). For an analysis of *Republic Aviation*, see *Eastex, Inc. v. NLRB*, 437 U.S. 556, 570-71 (1978), and Jay Gresham, Note, *Still as Strangers: Nonemployee Union Organizers on Private Commercial Property*, 62 TEX. L. REV. 111, 115-17 (1983).

25. *Babcock*, 351 U.S. at 113 (1956).

26. *Id.* at 114. The *Central Hardware* holding continued this limitation. 407 U.S. at 544-45.

27. *Hudgens*, 424 U.S. at 522.

28. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315, 318 (1968).

29. *Hudgens*, 424 U.S. at 520-21.

30. *Id.* at 521-22.

nizational activity on employer property.³¹ Some commentators have contended that in view of the very general statutory definition of "employee" in Section 2(3) of the NLRA,³² the nonemployee union organizers could have been treated as "employees" under the Act, although they did not have a common law employee-employer relationship with the employer.³³ In *Hudgens*, the Court applied the "statutory employee" principle to pickets even though they were not employees of the owners of the shopping center or even of the store located in the center where they were picketing.³⁴ In that case, the pickets were employees of a separate and remotely located warehouse of the company operating the store in the mall where the picketing took place.³⁵

VII. ESSENCE OF *BABCOCK* APPROACH

Subsequent panels of the Supreme Court have differed in emphasis placed on the various elements of the *Babcock* decision. However, it appears that the decision sets out the following elements:

1. "[The] employer may validly post [its] property against non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message. . . ."³⁶
2. The employer's posting of its property must not "discriminate against the union by allowing other distribution."³⁷
3. "The right of self-organization [under the NLRA] depends in some measure on the ability of employees to learn the advantages of self-organization from others."³⁸
4. These self-organizational rights under the NLRA and the preservation of private property rights are both granted by the federal government.³⁹
5. There must be an accommodation between these two sets of rights with as little destruction of one as is consistent with the maintenance of

31. "[T]he [*Babcock*] Court sowed the seeds of confusion that would perplex an entire generation of labor lawyers and adjudicators." Rodger C. Hartley, *The Supreme Court's 1991-1992 Labor and Employment Term*, 8 LAB. LAW., 757, 759 (1992). Accord Jay Gresham, Note, *Still as Strangers: Nonemployee Union Organizers on Private Commercial Property*, 62 TEX. L. REV. 111, 118-23 (1983); Russell A. Willis III, *A Survey of Recent Retail Facilities Nonemployee Access Decisions*, 32 MERCER L. REV. 797, 799 (1981); see also the dissent of Justice White in the *Lechmere* decision. 502 U.S. —, 112 S. Ct. at 852-53 (White, J., dissenting). While joining in Justice White's dissent, Justice Stevens did not agree with Justice White's suggestion that the *Babcock* case was incorrectly decided. *Id.* at 854 (Stevens, J., dissenting).

32. 29 U.S.C. § 152(3) (1988). "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise" *Id.*

33. See, e.g., Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere, Inc. v. NLRB*, 9 HOFSTRA LAB. L.J. 1, 11 (1991).

34. *Hudgens*, 424 U.S. at 520-21.

35. *Id.* at 510 n.3.

36. *Babcock*, 351 U.S. at 112.

37. *Id.*

38. *Id.* at 113.

39. *Id.* at 112.

the other⁴⁰ with the proper adjustments between the two sets of rights to be made by the NLRB.⁴¹

6. "[W]hen the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with [employees] through the [normal] channels, the [employer's] right to exclude" the nonemployees from the employer's property must "yield to the extent needed to permit communication of information on the right to organize [to the employees]."⁴²

While Supreme Court panels subsequent to *Babcock* have grasped different parts of the *Babcock* decision to achieve desired emphasis, none has indicated basic disagreement with the *Babcock* holding. Thus, the Court cites the *Babcock* ruling with apparent approval in the *Central Hardware*,⁴³ *Hudgens*,⁴⁴ *Sears*⁴⁵ and *Lechmere*⁴⁶ decisions.

In the authors' opinion, the employee-nonemployee distinction set out first in *Babcock* is a valid one, based on recognized principles of general property law and founded on a valid distinction between trespassers and non-trespassers on an employer's property.⁴⁷ In cases similar to *Lechmere*, parking areas are open to the public as well as to employees, but

40. *Id.*

41. *Babcock*, 351 U.S. at 112.

42. *Id.*

43. *Central Hardware Co.*, 407 U.S. at 543-45.

44. *Hudgens*, 424 U.S. at 522.

45. *Sears*, 436 U.S. at 204-05.

46. *Lechmere*, 502 U.S. —, 112 S. Ct. at 845-46.

47. In *Republic Aviation* the Court upheld the Board's ruling that an employer may not prohibit its employees from distributing union organizational literature in nonworking areas of its industrial property during nonworking time, absent a showing by the employer that a ban is necessary to maintain plant discipline or production. . . . In *Babcock & Wilcox*, on the other hand, non-employees sought to enter an employer's property to distribute union organizational literature. The Board applied the rule of *Republic Aviation* in this situation, but the Court held that there is a distinction 'of substance' between 'rules of law applicable to employees and those applicable to non-employees.' The difference was that the nonemployees in *Babcock & Wilcox* sought to trespass on the employer's property, whereas the employees in *Republic Aviation* did not.

Eastex, Inc. v. NLRB, 437 U.S. 556, 570-71 (1978) (citation omitted).

"A wholly different balance was struck when the organizational activity was carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests were there involved." *Hudgens*, 424 U.S. at 521-22 n.10.

Interestingly, in Justice Rehnquist's dissenting opinion in *Eastex*, he disagreed with the majority's analysis of the trespass/non-trespass distinction between *Republic Aviation* and *Babcock* as well as with the distinction made in *Hudgens*. *Eastex*, 437 U.S. at 581-82 n.1. (Rehnquist, J., dissenting). Justice Rehnquist, however, had joined in the majority *Hudgens* opinion in 1976. *Hudgens*, 424 U.S. 507. He viewed both cases as involving trespass, analyzing an employee rightfully on the property who failed to comply with conditions to remain there as a trespasser also. *Eastex*, 437 U.S. 581-82 n.1 (Rehnquist, J., dissenting). The *Eastex* case did not involve organizational activity, but rather the distribution of union literature in the workplace. *Id.* at 558. The literature urged political activity by employees in regard to labor related political issues. *Id.*

See Jack L. Whitacre, *Property Rights and Pre-Emption Under the National Labor Relations Act*, 47 Mo. L. Rev. 59, 60-61 (1982).

with posted prohibitions against solicitation and/or distribution of literature. Nonemployees who failed to comply with these rules were treated as trespassers because they violated their conditional right of entry as members of the public. Other related cases involved employee parking lots with access to the general public prohibited.

VIII. DERIVATIVE NATURE OF UNION "RIGHTS"

However, it appears that the basic source of the union organizer's limited right to access to employer property under *Babcock* deserves reexamination. The very nature of this right should play a more definitive role in determining when the exercise of this right will require nonemployee access to an employer's property for organizational purposes. The leading pertinent Supreme Court cases seem to agree that the source of the nonemployee union organizer's right is the right of the affected *employees* to self-organization under the NLRA and, therefore, the rights of the nonemployee organizers are derivative in nature.⁴⁸

The seminal *Babcock* decision indicates, "*The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others.*"⁴⁹ The 1972 *Central Hardware* decision declared:

*[b]ut organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights . . . In seeking to provide information essential to the free exercise of organization rights, union organizers have often engaged in conduct inconsistent with traditional notions of private property rights.*⁵⁰

The 1978 *Sears* decision did not address organization rights. Rather the *Sears* decision addressed area standards picketing, and primarily ruled on a federal pre-emption issue. Nevertheless, the Court commented:

[f]irst, the right to organize is at the very core of the purpose for which the NLRA was enacted. . . . Second, Babcock makes clear that the interests being protected by according limited-access rights to nonem-

48. The union's argument in *Babcock* was not that its organizers had a right to enter the employer's property, but that the employees there had a right to receive information concerning their right to organize. The derivative nature of the nonemployee organizer's privilege to enter private property had been recognized by the federal courts well before the Supreme Court's opinion in *Babcock*.

Jay Gresham, Note, *Still As Strangers: Nonemployee Union Organizers on Private Commercial Property*, 62 TEX. L. REV. 111, 122 (1983) (citing NLRB v. Cities Serv. Oil Co., 122 F.2d 149, 150 (2d Cir. 1941)).

49. *Babcock*, 351 U.S. at 113 (emphasis added). An early NLRB decision affirmed that the basic rights of the NLRA included "full freedom to receive aid, advice, and information from others, concerning those rights and their enjoyment." NLRB v. Harlan Fuel Co., 8 N.L.R.B. 25, 32 (1938).

50. *Central Hardware*, 407 U.S. at 543 (emphasis added).

ployee, union organizers are not those of the organizers but of the employees located on the employer's property. The [Babcock] Court indicated that 'no . . . obligation is owed nonemployee organizers'; any right they may have to solicit on an employer's property is a derivative of the right of that employer's employees to exercise their organization rights effectively.⁵¹

The 1975 *Hudgens* decision expanded the original *Babcock* doctrine to include other rights protected by the Act, i.e., picketing in support of a lawful economic strike. In citing *Babcock*, the Court stated: "Accommodation between employees' § 7 rights and employers' property rights . . . 'must be obtained with as little destruction of one as is consistent with the maintenance of the other.'"⁵²

The 1992 *Lechmere* decision concurs with the Court's earlier findings in regard to the source of pertinent rights. In the majority opinion by Justice Thomas, the Court stated, "By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers . . . [In *Babcock*] we recognized that . . . the employees' 'right of self-organization depends in some measure on [their] ability . . . to learn the advantages of self-organization from others.'"⁵³

IX. A CLOSER LOOK AT SOURCE OF UNION "RIGHTS"

Thus, it appears clear that the union organizer's right of access to employer property is a *derivative* right,⁵⁴ based entirely on the rights of the

51. *Sears*, 436 U.S. at 206 n.42 (emphasis added).

52. *Hudgens*, 424 U.S. at 521 (emphasis added).

53. *Lechmere*, 502 U.S. —, 112 S. Ct. at 845 (emphasis added). In a post-*Lechmere* decision, the District of Columbia Court of Appeals stated, "*Babcock* suggested that when the NLRA requires an employer to grant access to his property to nonemployee organizers, it does so only to protect the rights of his employees." *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1177 (D.C. 1993), cert. denied, 114 S. Ct. 1368 (1994) (emphasis added).

54. The concept of a "derivative right" affecting the use or control of real property is unusual. In the application involved in these comments, it permits a person to go onto private property and take part in certain activities that are contrary to the property owner's communicated prohibitions or regulations regarding the property. The property owner may have prohibited persons other than a specified class from being on the property, as when there is a parking lot operated exclusively for employees and nonemployees are prohibited access. Another application may be when the property owner allows access to the general public, but prohibits certain activities on the property, as when a parking lot is open to the public, but solicitation or distribution of literature of all kinds is prohibited on the parking lot property.

When the "derivative right" concept is applied in such situations, the rights of persons on the property at the owner's invitation or with his or her permission provide entry rights to other persons, otherwise prohibited from entering the property, and/or rights to engage in activities otherwise prohibited by the owner's restrictions and rules.

Instances in which such derivative rights impact property law and the normal rights of property ownership appear to be rare. One of the leading cases in this area involves state law, rather than federal, and a setting that does not directly impact federal labor law. In *New Jersey v. Shack*, 277 A.2d 369 (N.J. 1971), a staff attorney and a field worker for nonprofit corporations funded by the federal Office of Economic Opportunity entered the property of a landowner to provide health and legal services to migrant workers housed on the property owner's farm. *Id.* at 370. Both of these services were within the scope of services offered by the nonprofit corporations. *Id.* The staff members of the corporations

affected employees to exercise their rights of self-organization under the NLRA. While the Court may refer in short-hand fashion to the "rights" of union organizers in these situations, in every case it is, in fact, referencing the underlying rights of the employees under the NLRA. To evaluate and measure the nature of this derivative right, it becomes necessary to look closely at the NLRA rights of the employees from which the rights of non-employee union organizers draw their essence and substance.

In reviewing the basic rights of employees under the NLRA, it may be useful to reconsider the "standards" of the *Babcock* decision concerning when the employer cannot deny access to the nonemployee union organizer. These are: (1) when the employer's restrictions are enforced in a discriminatory manner against the union,⁵⁵ (2) when reasonable efforts by the union through other available channels of communication will not enable it to reach the employees with its message,⁵⁶ (3) when inaccessibility of employees makes ineffective the reasonable attempts to communicate with them through the usual channels,⁵⁷ (4) when the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them,⁵⁸ or (5) when other means of organization are not readily available.⁵⁹ Many of these standards simply restate or give examples of standards previously expressed and the set of standards (other than the non-discrimination prohibition) should not be viewed as essentially different or separate requirements. These standards are set out in connection with the Court's general observation that "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others."⁶⁰

entered the property and refused to depart upon demand of the owner. *Id.* Consequently, both were charged with and convicted of violating the state's trespass statute. *Id.*

The New Jersey Supreme Court found the owner could reasonably regulate the activities of such "trespassers" on his property, but could not bar them completely. *Id.* at 374. The court held that the conduct of the staff members was beyond the scope of the state trespass statute and directed judgments of acquittal. *Id.* at 375. The court stated, "[W]e find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being." *Id.* at 374. The court spoke in terms strikingly similar to the language of *Babcock*, indicating the importance of communication to the migrant workers making them aware of their rights and opportunities, and necessary "accommodation" between the rights of the workers and the landowner. *Id.* at 372-74. While the contrasts between the factual patterns in *Shack* and *Babcock* are numerous, the similarities are sufficient to note as an example of a derivative right impacting property law. For comments on the *Shack* case and related matters, see generally, RICHARD H. CHUSED, CASES, MATERIALS AND PROBLEMS IN PROPERTY 325-40 (1988); CURTIS J. BERGER, LAND OWNERSHIP AND USE 21-32 (3d ed. 1983); Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 663-68 (1991); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 675-77 (1988).

55. *Babcock*, 351 U.S. at 112.

56. *Id.*

57. *Id.*

58. *Id.* at 113.

59. *Id.* at 114.

60. *Babcock*, 351 U.S. at 113.

These standards, general though they may be, have become the benchmarks of determining when nonemployee access is indicated. As a result, both quantitative and qualitative measurements and evaluations have been made by the NLRB and the judiciary in determining if the standards are satisfied. In making these determinations, the full dimension of the union's "message" under *Babcock* is frequently overlooked or minimized. In each instance of using these standards, the breadth of the *employees'* rights under the NLRA must be considered. *These rights* are the source of the nonemployee union organizer's "rights" and must be considered in determining the adequacy of the union's alternative avenues of communication with the employees. The question is whether these avenues of communication are sufficient to inform the employees of their self-organizational rights under the NLRA so as to allow the employees to make *informed* decisions concerning whether they will be supportive of the union's activity in urging their self-organization.

X. SCOPE OF UNION "MESSAGE" UNDER *BABCOCK*

It would seem that a fair question to ask in connection with judging whether the union has reasonable avenues to reach employees (other than limited access to the employer's property) is: What is included in the message that union organizers might reasonably be expected to provide employees concerning the "advantages of self-organization?"⁶¹ Certainly the scope of the information concerning the employees' self-organization rights under the NLRA should impact and shape, to a degree, any evaluation of the adequacy of union access to the employees. However, it appears from examining the leading pertinent Supreme Court decisions that this subject rarely has been examined or explored to any extent.

An examination of the employees' rights of self-organization under the Act reveals that the message that union organizers should provide to employees is more than a simplistic notice that the union is seeking to organize the employees. It is worthwhile to re-examine these rights, which are complex and would reasonably require some explanation of how they impact employees.

It may come as a surprise to employees that the legislated policy of the United States, as set out in Section 1 of the NLRA, is to encourage the practice and procedure of collective bargaining and to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."⁶² Whether, in fact, such a policy is widely known or accepted by the general population of the nation may be a matter for private speculation and conjecture. Nevertheless, it is in the *context* of

61. *Id.*

62. 29 U.S.C. § 151 (1988).

such an announced policy that the basic rights of self-organization are set out in the Act.

XI. ESSENTIALS FOR EMPLOYEE DECISION-MAKING

Before employees can make intelligent decisions concerning the advantages and disadvantages⁶³ of self-organization, they must be aware of these rights and have at least a basic understanding of how they are affected by them.

Section 7 of the NLRA is pivotal in the rights afforded to employees under the Act. This section explicitly states,

[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities,

except to the extent that such a right to refrain is affected by a union shop agreement between the employer and the union as authorized by Section 8(a)(3) of the Act.⁶⁴ The concepts and applications of this section of the Act are not simple and have been the subject of many judicial decisions.⁶⁵

The limitations placed on employer activity that interfere with, restrain, or coerce employees in the exercise of Section 7 rights are set out in Section 8(a)(1) of the Act, which indicates that certain employer actions are unfair labor practices.⁶⁶ Again, the meaning and application of such interference, restraint, or coercion are not simplistic concepts and have frequently been addressed by the Supreme Court.⁶⁷

Included in the employer prohibitions set out in Section 8(a)(1) of the Act is the specific prohibition of employer "discrimination in regard to

63. While *Babcock* spoke of the importance of employees learning the *advantages* of self-organization, 351 U.S. at 113, Justice Powell, in writing the majority opinion in *Central Hardware*, stated, "[b]ut organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and *disadvantages* of organization from others." *Central Hardware*, 407 U.S. at 543 (emphasis added). Employees usually learn of the disadvantages of organization from their employers. Both the NLRA and the courts provide ample opportunity for this employer activity. Section 8(c) of the NLRA provides that an employer is free to express its views concerning organization, absent threat of reprisal or promise of benefit. 29 U.S.C. § 158(c) (1988). Further, the employer or his representatives can engage in solicitation of support against organization, even though this type of activity by employees might be regulated or even prohibited under its rules. *NLRB v. United Steelworkers of Am. [Nutone, Inc.]*, 357 U.S. 357 (1958). An employer may engage in "captive audience" speeches against organization to its employees without affording a similar opportunity to the union. *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953).

64. 29 U.S.C. § 157 (1988).

65. The full meaning of "concerted" activity has frequently been the subject of judicial decision by the Supreme Court. Examples of such complex interpretation inquiries can be found in *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984) and *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975).

66. 29 U.S.C. § 158(a)(1) (1988).

67. An example of the Court's interpretation of verbal coercion can be found in *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" as set out in Section 8(a)(3).⁶⁸ Also included among possible employer unfair labor practices is the domination or interference with the formation or administration of labor organizations as set out in Section 8(a)(2).⁶⁹ Likewise, the full meaning of these statutory terms can only be ascertained by understanding the applicable NLRB and judicial decisions.

Included in an employee's understanding of her or his rights under the Act must be the process by which union representation is achieved and elections are conducted as set out in Section 9 of the NLRA.⁷⁰ These statutory provisions are also impacted by NLRB rules and decisions as well as judicial determinations.

It would seem essential to an employee's knowledge of the advantages of self-organization to be aware of the employer's duty to bargain in good faith with representatives of employees as set out in Section 8(a)(5)⁷¹ and Section 8(d)⁷² of the Act. Again, the concept of bargaining in good faith is a complex one, not easily ascertained from a reading of the Act absent some knowledge of the Board and judicial interpretations of the statutory language.

Further illustrations of the complex subject matter of rights guaranteed by the Act to employees engaged in self-organization could be set out. However, perhaps these will suffice to illustrate that making employees aware of their rights under the Act and the advantages of self-organization is not a brief, simple exercise, quickly and easily achieved.

XII. *BABCOCK* DOCTRINE: INFORMATIONAL IN NATURE

By way of repetition, a union representative's "right" of access to an employer's property is a derivative one, based upon the rights of the affected employees to learn of their rights under the NLRA. *Babcock* and its progeny indicate that the employees' right to learn the advantages of self-organization is the source of union organizer's "rights" to have access to employer property. The thrust of the *Babcock* doctrine must be informational in nature. The test is whether the alternatives to employer property access provide an adequate means for the union to communicate its message to the employees involved. The union message is to inform the employees of their rights under the Act.

XIII. A PROPER TEST FOR ALTERNATIVE AVENUES

In examining whether alternative avenues available to the union satisfy the *Babcock* criteria, it is impossible to evaluate the alternative methods without a serious examination of the union's task in advising the employ-

68. 29 U.S.C. § 158(a)(3) (1988).

69. 29 U.S.C. § 158(a)(2) (1988).

70. 29 U.S.C. § 159 (1988).

71. 29 U.S.C. § 158(a)(5) (1988).

72. 29 U.S.C. § 158(d) (1988).

ees adequately, if not fully, of their rights so that they can make informed decisions concerning whether to support the union in exercising their right of self-organization. As a result of such union access, the employees should be aware, at least in a general way, of the nature of their protected rights under the act, limitations placed on employers prohibiting interference with these rights, the process by which union representation can be achieved, and the duty of employers to recognize the employees' choice of a representative and to bargain in good faith with the representative. As indicated earlier, many of the concepts related to these matters are complex rather than simple. Some of these concepts may already be familiar to some of the employees. To other employees in the 1990s, these concepts may be foreign and strange and not immediately or easily understood to a degree allowing them to make informed decisions about whether they wish to exercise their rights of self-organization by supporting the union.

The *Babcock* doctrine speaks of the union's ability to reach the employees through available channels of communication with its "message," the advantages of self-organization, etc. In making the determinations suggested by *Babcock*, it is essential to consider the scope of the "message" and what it reasonably may entail in evaluating the alternative methods available for the union to reach and communicate with the affected employees.

XIV. IS MERE NOTICE PROPER ACCESS?

The genesis of the idea for this article resulted from reading the Supreme Court's majority opinion in *Lechmere*. The opinion comments that actual contact with the employees by the union was not required by the *Babcock* standards and that signs or advertising utilized by the union may suffice.⁷³ The majority opinion then makes the observation that, "[t]hus, signs (displayed, for example, from the public grassy strip adjoining Lechmere's parking lot) would have informed the employees about the union's organizational efforts."⁷⁴ This remarkable statement is indicative of the majority's view of what is required under the *Babcock* requirement of employees being informed of the advantages of self-organization under the NLRA. A sign held so that those in passing vehicles can read it (a technique not infrequently used to advise the public of a high school fund-raising car wash) would, in the majority's view, provide adequate access of the union to the employees. This illustration did not fail to catch the attention of Justice White in his dissent. Justice White observed

[m]oreover, the Court in *Babcock* recognized that actual communication with nonemployee organizers, not mere notice that an organization campaign exists, is necessary to vindicate Section 7 rights. If employees are entitled to learn from others the advantages of self-

73. *Lechmere*, 502 U.S. —, 112 S. Ct. at 849.

74. *Id.* at 849-50.

organization, it is singularly unpersuasive to suggest that the union has sufficient access for this purpose by being able to hold up signs from a public grassy strip adjacent to the highway leading to the parking lot.⁷⁵

Thus, the issue is joined. What is the scope of the message and activity of union organizers under *Babcock* to be used in deciding if they have reasonable access to employees outside of the employer's property? The writers suggest that under *Babcock*, far more than mere notice of a union organizational campaign is required in the union's efforts to advise employees of their rights of self-organization. In fact, in the *Babcock* holding, the word "notice" is only used in connection with the employer posting its property and never in regard to the activities of the nonemployee union organizers communicating with the affected employees concerning their rights under the NLRA.⁷⁶

XV. *BABCOCK* SETTING

In the touchstone *Babcock* case, the Supreme Court held that the union had reasonable avenues to communicate with the employees about the advantages of self-organization without permitting union access to the employer's property.⁷⁷ In considering the nature of communication contemplated by the Court, it will be worthwhile to consider the setting of the *Babcock* case. Of the employer's 500 employees, 40% lived within a mile of the plant or in a community of 21,000 people and the remainder within a thirty-mile radius. More than 90% of the workers came to work in private automobiles and parked in the plant employee parking lot.⁷⁸ Noting that the plant was close to a small well-settled community where a large percentage of the employees lived, the Court held that while the living quarters of the employees were scattered, they were within "reasonable reach."⁷⁹ The Court commented that the usual methods of imparting information were available and cited its footnote 1 as an indication of the validity of its conclusion.⁸⁰ Footnote 1 stated:

[o]ther Union contacts with employees: In addition to distributing literature to some of the employees, as shown above, during the period of concern herein the Union has had other contacts with some of the employees. It has communicated with over 100 employees of Respondent on 3 different occasions by sending literature to them through the mails. Union representatives have communicated with many of Respondents' employees by talking with them on the streets of Paris, by driving to their homes and talking with them there, and by talking with them over the telephone.⁸¹

75. *Id.* at 851 (citations omitted).

76. *Babcock*, 351 U.S. at 112.

77. *Id.* at 113.

78. *Id.* at 106-07.

79. *Id.* at 113.

80. *Id.*

81. *Babcock*, 351 U.S. at 107 n.1.

Thus, the Court indicates the methods of communication included: (1) the distribution of literature at the plant entrance at the driveway-highway junction, (2) mailing literature to 20% of the employees on three occasions, (3) talking to "many" of the employees on the streets of the small town in which, or near which, they lived, (4) driving to the employees' homes and talking with them, and (5) talking with them on the telephone. The Court does not indicate the number of employees reached by the last three methods. Three of the methods indicated as the usual avenues of imparting information involved personal contact with the employees. It is interesting to note in the examples cited by the Court the high involvement of such contact, giving opportunity for personal responses and/or questions.

Justice Thomas is correct in his *Lechmere* comment that there is no specific Supreme Court precedent that personal contact is required for reasonable union access to employees.⁸² However, equally lacking in supporting precedent is his statement that "signs or advertising" may suffice to provide reasonable access to employees.⁸³ As indicated earlier, Justice White in his *Lechmere* dissent indicates that "actual communication" with nonemployee organizers is necessary to "vindicate" Section 7 rights and that mere "notice" of the union campaign will not suffice to satisfy the *Babcock* requirements.⁸⁴

In the myriad of pre-*Lechmere* cases addressing what was required for a union to have reasonable access to employees, there was no set litmus test or criteria for judging whether the union access to employees satis-

82. *Lechmere*, 502 U.S. —, 112 S. Ct. at 849. The union's impersonal methods of contacting and communicating with employees away from the workplace may create substantial obstacles to effectiveness. Judge Clark of the Second Circuit stated that the impersonal avenues

bear without exception the flaws of greater expense and effort, and a lower degree of effectiveness. Mailed material would be typically lost in the daily flood of printed matter which passes with little impact from the mailbox to wastebasket. Television and radio appeals, where not precluded entirely by cost, would suffer from competition with the family's favorite programs and at best would not compare with personal solicitation. Newspaper advertisements are subject to similar objections.

NLRB v. United Aircraft Corp., 324 F.2d 128, 130 (2d Cir. 1963).

"Of the many possible alternative channels of communication identified by the Board and the courts, media such as radio, television, newspapers, mass mailings, placards, posters, and billboards are 'impersonal' in the sense that they do not allow direct contact between employees and nonemployee organizers." Jay Gresham, Note, *Still as Strangers: Nonemployee Union Organizers on Private Commercial Property*, 62 TEX. L. REV. 111, 137 (1983).

83. *Lechmere*, 502 U.S. —, 112 S. Ct. at 849.

84. *Id.* at 851.

First, we recognize that personal contact is an important part of any organizing effort. Whether to opt for a union, or not, is rarely a cut-and-dried proposition; there are pros and cons, the evaluation of which may be better suited to the dynamics of lively discourse than to the static impersonality of more remote approaches. Non-unionized workers are often fearful of management's reactions to the proposed introduction of a union, and personal contact is extremely useful in overcoming such timorousness.

Lechmere, 914 F.2d 313, 323 (1st Cir. 1990), *rev'd*, 502 U.S. —, 112 S. Ct. 841 (1992).

fied the *Babcock* standards. It was correct and appropriate that no such set formula was set out because in each case the basic factual pattern varied. Justice Thomas declared that "[b]ecause the employees do not reside on Lechmere's property, they are presumptively not 'beyond the reach' of the union's message."⁸⁵ Any such presumption would be quickly rebutted by a showing that the union does not have reasonable access to inform the employees of their rights of self-organization. His reference is to the "logging camp" type of situation in which the employees are virtually isolated from contact by the union.⁸⁶ The use of the presumption language in cases like *Lechmere* is misleading, since even the test applied by the *Lechmere* majority would involve evaluation of avenues of access that *are* available to the union. The Court's comment is based on the accepted rule that in cases of such complete or virtual isolation, there is a presumption that the union does not have reasonable access to the employees.⁸⁷ This was not the case in *Babcock* or *Lechmere*. Clearly, the *Babcock* doctrine is not limited to such factual patterns.

XVI. LECHMERE MODIFICATION OF BABCOCK

While the majority *Lechmere* decision gives lip service to the *Babcock* doctrine, it in essence changes the teaching of *Babcock* and expresses a new rule in regard to nonemployee access to employer property for organizational purposes. *Babcock* spoke of accommodation between Section 7 rights and property rights,⁸⁸ and *Hudgens* also addressed such an accommodation with the locus of the accommodation falling at different points along the spectrum, depending on the nature and strength of the respective Section 7 and private property rights in any given context.⁸⁹ *Lechmere* holds that the accommodation inquiry is pertinent only in cases in which union access to employees is "infeasible."⁹⁰ "So long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place."⁹¹ The *Lechmere* Court indicates that the *Babcock* rule of access by nonemployees is limited to employees, who, "by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society."⁹² *Babcock* speaks of the inability of reaching employees "through

85. *Lechmere*, 502 U.S. —, 112 S. Ct. at 849 (citing *Babcock*, 351 U.S. at 113).

86. The *Lechmere* Court cites what it describes as "classic examples" of such situations: logging camps, *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948); mining camps, *Alaska Barite Co.*, 197 N.L.R.B. 1023 (1972); and mountain resort hotels, *NLRB v. S & H Grossinger's Inc.*, 372 F.2d 26 (2d Cir. 1967). *Lechmere*, 502 U.S. —, 112 S. Ct. at 849.

87. See generally STEPHEN I. SCHLOSSBERG & JUDITH A. SCOTT, ORGANIZING AND THE LAW 49, 50 (4th ed. 1991); Max Zimny, *Access of Union Organizers to "Private" Property*, 25 LAB. L.J., 618, 621-23 (1974).

88. *Babcock*, 351 U.S. at 112.

89. *Hudgens*, 424 U.S. at 522.

90. *Lechmere*, 502 U.S. —, 112 S. Ct. at 848.

91. *Id.*

92. *Id.* at 849.

other available channels of communication,"⁹³ "the reasonable attempts by nonemployees to communicate with them through the usual channels" being "ineffective" because of an inaccessibility of employees,⁹⁴ and employees being "beyond the reach of reasonable union efforts to communicate with them."⁹⁵ While the distinction may be subtle, it appears that the *Lechmere* Court thinks in terms of the "ordinary flow of information that characterizes our society," while the *Babcock* Court addresses actual communication. This distinction is best seen in the *Lechmere* language that the employees' mere awareness of the union organizational campaign satisfies any Section 7 right that the employees may have to learn the advantages of self-organization.⁹⁶

In addressing the proper meaning of the *Babcock* requirement that the employees are "beyond the reach of reasonable union efforts to communicate with them,"⁹⁷ Professor Roger C. Hartley has suggested that the *Babcock* language is susceptible to at least two quite contrasting interpretations. The first, he notes, requires only an examination of whether the union literally has the ability to gain access to the workers by exercising reasonable efforts. Such an inquiry does not examine the quality of possible communication. The second, according to Professor Hartley, would mean that the union's efforts are reasonable only if the resulting communication is "meaningful." He suggests that the *Lechmere* court "edged the law toward the physical proximity view of *Babcock & Wilcox*, but did not abandon completely the notion that the effectiveness of the resulting communication is a relevant consideration."⁹⁸

XVII. LECHMERE STANDARDS

What then would satisfy the *Lechmere* criteria of situations in which the Section 7 rights of employees to learn the advantages of self-organization would justify union nonemployee access to employer property? The *Lechmere* decision indicates that "unique obstacles" to the union reaching the employees must exist before such employer property access would

93. *Babcock*, 351 U.S. at 112.

94. *Id.* It has been suggested that the "effective" language under *Babcock* has frequently been satisfied by finding that any alternative means of reaching the employees exists, and that the practical sense of the word has not been addressed. However, the *Babcock* language leaves open a consideration of relative effectiveness. Note, *Nonemployee Union Organizers Granted Access to Company Property for Solicitation Purposes*, 67 MICH. L. REV. 573, 578, 582 n.47 (1969).

95. *Babcock*, 351 U.S. at 113. "The right of employees to act in concert for self-organization and other mutual aid and protection is the core of the national public policy embodied in the NLRA to encourage collective bargaining. Realization of this right requires a maximum opportunity for effective communication with employees." Max Zimny, *Access of Union Organizers to "Private" Property*, 25 LAB. L.J. 618, 624 (1974).

96. *Lechmere*, 502 U.S. —, 112 S. Ct. at 849-50.

97. *Babcock*, 351 U.S. at 113.

98. Roger C. Hartley, *The Supreme Court's 1991-1992 Labor and Employment Law Term*, 8 LAB. LAW. 757, 759-60 (1992). The authors fail to share Professor Hartley's view that *Lechmere* gives room to consider the communication effectiveness issue. See *supra* text accompanying note 14.

be permitted,⁹⁹ and the decision seems to indicate that literal "isolation" of the employees must exist before the property access would be permitted.¹⁰⁰ This reasoning seems to be the basis of the *Lechmere* Court fastening on the *Babcock* illustration of employees' living quarters and the plant location to fashion its presumption that because the employees do not reside on the employer's property, they are presumptively not beyond the reach of the union.¹⁰¹ Thus, it would appear that virtual isolation of the employees from the union or some other "unique obstacles" would be required for the *Babcock* doctrine to function in allowing access to employer property. Such a strict reading of the *Babcock* decision departs from earlier readings of *Babcock* by the *Central Hardware*, *Hudgens* and *Sears* Courts.

XVIII. ACCESS NOT SUCCESS

While the competition is fierce, probably the most intriguing statement of the *Lechmere* Court is "[a]ccess to employees, not success in winning them over, is the critical issue—although success, or lack thereof, may be relevant in determining whether reasonable access exists."¹⁰² While the phrase is catchy, it is difficult to recall any contention that union success in organizing is pertinent in the *Babcock* inquiries in any way.¹⁰³ Also, it is difficult to know exactly what to do with the rest of the above quotation. If lack of success is relevant in determining whether access exists, how, in fact, does such relevance function? Could failure of a union to win the support of enough employees to establish "substantial interest"¹⁰⁴ in the union (as a basis for a representation petition) be the basis

99. *Lechmere*, 502 U.S. —, 112 S. Ct. at 850.

100. *Id.* at 849.

101. *Id.* For a post-*Lechmere* decision involving the access issue, see *Oakwood Hosp. v. NLRB*, 983 F.2d 698 (6th Cir. 1993).

102. *Lechmere*, 502 U.S. —, 112 S. Ct. at 850. The reversed *Lechmere* First Circuit holding had noted,

Accessibility, in this context, is dichotomous. One aspect implicates the geography of the workplace. . . . The second aspect of accessibility implicates the identifiability of the work force: if the union does not know, and cannot readily learn, the names and addresses of the employees, alternative means will in many cases shrink dramatically in effectiveness.

Lechmere, 914 F.2d 313, 323 n.12 (1st Cir. 1990), *rev'd*, 502 U.S. —, 112 S. Ct. 841 (1992).

103. It is not a direct object of the labor act to protect the desire of unions for the most effective and simple organizational techniques; the act does not guarantee success, but only that the avenues of communication are open enough so that the employees may be informed adequately of their rights.

Dexter L. Hanley, *Union Organization on Company Property - A Discussion of Property Rights*, 47 GEO. L.J. 266, 301 (1958).

104. As a requirement for a representation election, Section 9(e)(1) of the NLRA requires a showing that 30% of the employees in a bargaining unit indicate a desire to be represented by the union. 29 U.S.C. § 159(e) (1988). Whether a union has adequate access to employees outside of employer property is usually litigated as a Section 8(a)(1) unfair labor practice complaint when the employer has (1) refused union access to the employer's property, (2) used the local trespass law to remove union representatives from the property, or (3) threatened use of the trespass law when union representatives conducted organizational activity on employer property. See generally STEPHEN I. SCHLOSSBERG AND JUDITH A. SCOTT, *ORGANIZING AND THE LAW* 47-51 (4th ed. 1991).

of proving that the union did not have reasonable access? The answer is likely "no" and this aspect of the Court's opinion is likely dictum without practical utility.

Lost in the language of the *Lechmere* decision is meaningful attention to the origin of the rights of the union nonemployee organizers under *Babcock*. Their rights spring from the rights of employees to learn the advantages of self-organization. The complex nature of these rights has been discussed earlier. The *Lechmere* Court seems to indicate that mere notice of a union organizational campaign can satisfy these Section 7 rights of the employees. Such a holding is consistent with the Court's strict reading, if not out-right modification, of *Babcock* and with its view that virtual isolation or unique obstacles to the union's efforts will be necessary before access to employer property is permitted. The *Lechmere* holding minimizes the relative importance and nature of the Section 7 rights of the employees in its limited view of what is required to inform employees of the advantages of self-organization under the NLRA.

XIX. CONCLUSION

Under *Babcock* and even under *Lechmere*'s nominal endorsement of the *Babcock* requirements, the question arises concerning whether the union nonemployee organizers have reasonable access to affected employees to inform them of their rights of self-organization under the NLRA. If not, the organizers may have a limited right to enter the employer property to reach the employees. There is no dispute that any rights the union may have in this regard spring from the Section 7 rights of the employees and are, therefore, derivative in nature. In judging the adequacy of union opportunities to communicate with employees short of permitting them to enter employer property, the nature of the union message is of critical importance. The message of the union organizers, according to *Babcock* and progeny, is to inform the employees of their rights under the Act. While attempted persuasion will obviously be involved, the informational aspect of this message must be emphasized. In judging the adequacy of union access to employees, the nature of what the union will attempt to communicate to the employees should be an important feature of any such evaluation. Obviously, the informational aspect of the union's task far exceeds mere notice of the union's organizational campaign.

No attempt will be made to review all of the possible avenues or mechanisms the union has for reaching the employees. Some may involve direct personal contact, others may not. Shifting and changing patterns of commercial and residential development may impact the effectiveness of alternative modes of reaching and communicating with employees.¹⁰⁵

105. The question of the union's right of entry has become increasingly important as employers move to suburban locales to avoid the disadvantages of an urban environment. For many of these employers relocation has removed them from municipal streets, where unions could communicate easily with

But as the NLRB and the courts attempt to decide if these avenues provide reasonable channels of communicating with the employees, in every instance the nature of the union message that is contemplated in *Babcock* should be considered. The employees have a Section 7 right to learn of the advantages of self-organization. This includes the nature of their rights under the Act, limitations on employer interference with these rights, the process of a union gaining representation rights, the duty of good faith bargaining on the part of the employer. All of these rights, and arguably more, would be included when the employees learn the advantages of self-organization. Any union access to the employees that would be deemed reasonable should provide some meaningful opportunity to effectively communicate such matters. It is submitted that access that does not permit such opportunity is less than reasonable and should be the basis for nonemployee union representatives being permitted onto employer property, with proper regulation, to exercise their derivative Section 7 rights of communicating with the employees. In such instances, the employees may or may not decide to exercise their right of self-organization, but their decisions should be informed ones according to the standards first set out in *Babcock*.

Has the *Lechmere* decision made the union organizer's right of entry onto employer property a less "murky" corner of the law?¹⁰⁶ The lack of definitive guidelines in this area of the law prior to *Lechmere* may well have resulted because "access cases are highly fact-intensive, and the Board's decisions often turn on narrow factual points."¹⁰⁷ Under *Lechmere*, this area of law may be less "murky" due to the narrow application of *Babcock* concepts and principles propounded by the *Lechmere* majority. While the *Lechmere* standards are simple and narrow, they have destroyed the flexibility and adaptability of the *Babcock* principles¹⁰⁸ that

employees, customers and suppliers, to relatively isolated areas, often to large shopping centers or industrial parks. Union communication is hampered because intended addressees drive onto the employer's property. Also, forcing a union to conduct its activity from the outskirts of a shopping center or industrial park rather than in close proximity to the target employer diffuses the focus and softens the impact on that employer and at the same time increases the danger of undesired impact on neutral employers. Suburbanization has also meant that employee residences are scattered over wider areas. As it becomes increasingly difficult for union representatives to communicate with employees, customers and suppliers, the need for access to the employer's property becomes more important.

Michael A. Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 HARV. L. REV. 552, 553 (1970).

106. See *supra* text accompanying note 1. While Judge Selya's Circuit Court of Appeals decision was reversed by the Supreme Court in its *Lechmere* holding, the Court's reversal does not take issue with Judge Selya's description of this area of the law.

107. Peter J. Ford, *The NLRB, Jean Country, and Access To Private Property: A Reasonable Alternative To Reasonable Alternative Means of Communication under Fairmont Hotel*, 13 GEO. MASON U. L. REV. 683, 702 (1991).

108. "The *Babcock & Wilcox* test . . . is full of open-ended language: inaccessibility, ineffective, reasonable attempts, communicate, usual channels." Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere, Inc. v NLRB*, 9 HOFSTRA LAB. L.J. 1, 12 (1991). One commentator has praised the *Lechmere* "standard

allowed protection and application of affected employees' Section 7 rights of self-organization in varying appropriate situations.

An intriguing inquiry relates to the status of *Babcock* and the principles and standards set by it in regard to nonemployee union access to employer property. *Lechmere* did not overrule the *Babcock* holding; it merely interpreted parts of it to suit its purposes. It is anticipated that future reconstituted panels of the Supreme Court will look not only at *Lechmere* for guidance, but also at the seminal *Babcock* holding in confronting the central issues addressed in both holdings.

Intelligent persons may differ in good faith over the viability and need of self-organization and unions today. Obviously, such disagreement will continue. Ultimately, the work force, also made up of intelligent persons of good faith, will determine the need for organized labor.¹⁰⁹ Of vital importance, however, is that employees be permitted to make such choices about the advantages and disadvantages of self-organization based upon adequate knowledge and information.

[as being one] that is quickly and easily administered." Michael L. Stevens, *The Conflict Between Union Access and Private Property Rights: Lechmere, Inc. v. NLRB and the Question of Accommodation*, 41 EMORY L.J. 1317, 1367 (1992). To the contrary, another writer indicates, "The [*Lechmere*] Court's deviation from *Babcock* also may damage the sense of certainty that the test established in *Babcock* provided the parties involved in a conflict between organizational Section 7 rights and property rights." Jeff T. Courtney, Note, *Nonemployee Union Organizers and Access to Private Property: Lechmere, Inc. v. NLRB*, 26 CREIGHTON L. REV. 585, 604 (1993) (footnote omitted).

109. Chief Justice Charles Evans Hughes, in authoring the majority opinion upholding the constitutionality of the NLRA observed,

Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (citation omitted). Today's employees may or may not share the sense of frustration and impotency in regard to their work environment that was described by Chief Justice Hughes over a half century ago. Even if they experience similar concerns, they may or may not consider unions or organized labor an effective remedy.

